

# **Herbert E. Gregory v. U.S. General Accounting Office**

**Docket No. 20-101-15-82**

**Date of Decision: February 13, 1984**

**Cite as: Gregory v. GAO (2/13/84)**

**Before: Bowers, Presiding Member**

**Off-Duty Misconduct**

**Efficiency of Service**

**Improper Personal Conduct**

**Discipline**

## **ORDER**

On May 16, 1983, the Presiding Member issued an Order which held that the Petitioner's appeal was timely only insofar as it concerned the decision by the General Accounting Office not to reinstate the Petitioner to active duty following his mistrial in October 1982. At the time that Order was issued, the State's Attorney for Maryland had not made a determination whether or not the Petitioner would be retried. On July 8, 1983, the Petitioner was retried and found guilty of "Assault with Intent to Commit a Second Degree Sexual Offense." On August 18, 1983, the Petitioner was sentenced to six years imprisonment; five years probation; and required to submit to counseling. Three years of the six-year sentence was suspended.

The General Accounting Office filed a Motion for Summary Judgment on November 14, 1983, asserting that the papers and pleadings in this case show no genuine issue of material fact and, thus, that it is entitled to a judgment as a matter of law. Specifically, the GAO argues that the declaration of mistrial is not equivalent to a finding of innocence and, hence, that there was no change in the circumstances which justifiably caused the Petitioner to be indefinitely suspended without pay effective May 9, 1982. The GAO also asserts that the resulting finding that the Petitioner was guilty in the second criminal trial buttresses the appropriateness of its decision not to reconsider his employment status after the declaration of a mistrial in October 1982.

The Petitioner responded by filing a Cross-Motion for Summary Judgment on December 7, 1983. In this Motion, the Petitioner contends that the GAO unlawfully suspended him when it did not properly determine the veracity of the charges against him in May 1982. Furthermore, the Petitioner argues that the GAO's failure to make such a determination necessarily made it impossible, in contravention of 5 U.S.C. §§7512 and 7513, for the GAO to support a claim that the Petitioner's indefinite suspension without pay was only taken "...for such cause as will promote the efficiency of the service." In this case, the Petitioner also maintains that the GAO could only have made such a showing if it was able to establish nexus between the off-duty misconduct and the work situation. Since the GAO failed to do so, the Petitioner argues that his indefinite suspension without pay is unlawful. He further decries the attempt by the GAO to hold itself blameless for these actions by asserting that his ultimate conviction proved the

appropriateness of its decision and the conformity of this decision with existing law.

The Presiding Member does not condone what appears, from the present record, to be the failure of the GAO to properly investigate the circumstances which gave rise to the Petitioner's indefinite suspension without pay on May 6, 1982. It is clear from her Order of May 16, 1983, however, that the untimeliness of the Petitioner's complaint with respect to this matter prohibits him from resurrecting this issue in the manner stated in the Cross-Motion for Summary Judgment.

Furthermore, the Presiding Member agrees with the GAO that the declaration of mistrial on October 23, 1983, is not tantamount to a finding of innocence with respect to the charges made. That is not to say, however, that the GAO prevails in entirety as a consequence of its Motion for Summary Judgment.

Under 5 U.S.C. §7513(a), an agency may suspend an employee for more than 14 days "only for such cause as will promote the efficiency of the service."<sup>1</sup> The courts have held that in order to show that an adverse action taken for off-duty misconduct will promote the efficiency of the service, an agency must establish a nexus between the off-duty misconduct and the efficiency of the service.<sup>2</sup> See D.E. v. Department of the Navy, No. 82-7332 (9th Cir., June 7, 1983), 21 GERR 1377; Bonet v. Postal Service, 661 F.2d 1071 (5th Cir. 1981); Sherman v. Alexander, 684 F.2d 464 (7th Cir. 1982); Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); Doe v. Hampton, 566 F.2d 265 (D.C. Cir. 1977). The burden is on the agency to prove that the off-duty misconduct adversely affects the employee's or the agency's performance. Such a nexus may not merely be presumed, no matter how egregious or reprehensible the off-duty misconduct. Bonet, supra (sexual indecency with a child); D.E., supra (conviction of child molestation). See also, In the matter of Arbitration between SSA and AFGE, Local 1923, 21 GERR 1106 (5-23-83).

Simply put, the record does not show whether GAO determined, at the time the Petitioner requested reconsideration of his employment status, how his continuation on indefinite suspension without pay would "...promote the efficiency of the service," or, if it did, the basis for such determination. Therefore, summary judgment is not appropriate. The Presiding Member finds that a hearing is necessary at which the parties shall confine themselves to the issue of whether the Petitioner's continuation on indefinite suspension promoted the efficiency of the service.

Consequently, GAO's motion for summary judgment and Petitioner's cross-motion for summary judgment are denied. A hearing before the Presiding Member will be scheduled promptly.

## Notes

1. See 31 U.S.C. §732(d)(4) for application of 5 U.S.C. §§7501 et seq. to GAO. See also GAO Order 2752.1, Chapter 3.

2. From the state of the present record, it appears that the conduct Petitioner was charged with occurred off duty. If it had occurred on duty, then summary judgment for GAO would be proper. At the time Petitioner sought reinstatement he was under criminal indictment. In Brown v. Department of Justice, No. 82-1729 (D.C. Cir., Aug. 26, 1983), 21 GERR 1825, the Court of Appeals held that an agency may properly rely upon an indictment to justify a suspension of an employee pending resolution of criminal charges alleging "a work-related crime."